SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 21 1964
JOHN F. DAVIS, CLERK

No. 293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

ANDREW PASHA, PETER GRAFNER, and ARTHUR MONACO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS.

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This reply is written principally for the purpose of illuminating the Court, without extensive record reference, as to the actual premises upon which these petitioners pray the issuance of the Writ. The petitioners are of the opinion that the summary treatment of the record by the Government results in an untrue cast upon the actual events.

1. The Government argues that the *specific* objection of violation of Section 605 of the Communications Act was never made at trial, and that the only grounds for exclusion raised were (1) that the agents conduct was not authorized by the search warrant and (2) that it was hearsay (p. 4, Government's brief).

We submit that the foregoing is a misstatement. The "Additional Motion to Suppress" (App. 2) was based exclusively on violations of Section 605. While that motion was not expressly directed to the phone calls complained of, the Court of Appeals for the Seventh Circuit obviously considered the Motion sufficiently comprehensive to includ them, and to devote the major portion of its opinion to the question of whether under Section 605 these conversations could be testified to (App. 6a-8a). Further, the Assistant United States Attorney who briefed the case and argued on appeal never contested that the ground for complaint had been adequately preserved. Further, that Assistant United States Attorney was also trial counsel with a full and complete comprehension of the proceedings. The practical fact is that the decision of the Seventh Circuit is on the law books. It has been regarded as a "momentous" decision. It has been considered the authority for repetition of the mode of invasion of privacy by federal and state officials inaugurated (at least in this area) in this case. With even our limited resources to actual statistics, we are informed it was followed in the following cases now pending in the United States District Court for the Northern District of Illinois alone:

1. *U.S.* v. *Robert J. Paul and Frank Ciconti*, 64 CR 502;
2. *U.S.* v. *Lem Douard and Frank Moliere*, 64 CR 503;
3. *U.S.* v. *Rocco Dote and Theodore P. Veesart*, 64 CR 504;
4. *U.S.* v. *Guglielmo and Delmonico*, 64 CR 505;
5. *U.S.* v. *Louis Gramas*, 64 CR 506;
6. *U.S.* v. *Carl Nicoletti*, 64 CR 507;
7. *U.S.* v. *Thomas Blando*, 64 CR 508.

We, further, submit the record clearly reflects that objection to the introduction of these conversations on the basis of violation of the Fourth, Fifth and Sixth Amendments was fully preserved.

"Miss Lavin: This, your Honor, goes to the very point that I brought up before we started picking any jury. These gentlemen gained access to the apartment for the purpose of executing a search warrant. They did not gain access to the apartment for the purpose of taking over the establishment."

On behalf of the defendants I invoke the Constitutional rights of the defendants."

• • •

"This is not what I am talking about. I am talking about these men going in and sitting down and taking over the apartment, receiving the phone calls, and attempting, as I think they are going to—perhaps I am, as I say, because of my hearing, a little bit anticipatory—I expect we are going to have testimony on that score, and I say that that is violative of the Fifth Amendment to the Constitution of the United States; that the search warrant only warranted them to go in and seize what was described in there, and did not authorize them to take over the premises, and go into business."

• • •

"Miss Lavin: I am going to object to that unless we are able to have a better foundation.

Miss Lavin: Then may I make a further objection, sir, and perhaps this is again anticipatory, that the evidence about to be adduced over my objection will not be directed or I cannot identify against which of the defendants it is being directed." (A. 90)

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"Miss Lavin: I object to the conversation as outside of the presence of the defendants, no sufficient foundation, and it is impossible—

• • •

"Miss Lavin: If your Honor please, before we go any further, what was said over the telephone was obviously out of the presence of the defendants unless there was some kind of an amplifier on that phone.
Mr. Schippers: Your Honor, the same objection was raised as to the testimony of Agent Homa, and we demonstrated the law with respect to that objection.
The Court: You object to his telling about this incident?
Miss Lavin: I object. (A. 140-141)

• • •

"Miss Lavin: Your Honor, I am again going to move to strike the testimony on the ground that it is impossible for me to determine against which of—against whom, if any, of the defendants, that was offered." (A. 142)

• • •

The Government states the warrant authorized the agents to seize "telephones" and, thus, we cannot claim they "interfered with property with which they were not authorized to deal"; that the phone conversations are in the same posture as face-to-face conversations which the parties did not take precautions against being overheard; that *Abel* v. *United States*, 362 U.S. 217 authorized the retaining of an "unanticipated find"; that as law enforcement officers they were allowed to use decoys; and finally, not being parties to the conversation, these petitioners are without standing to object.

We submit the arguments are without merit. First, the authority to seize telephones does not constitute authority to intrude upon, receive and seize telephone messages, and the latter were not within the scope of the warrant. Secondly, face-to-face conversations and decoys are not protected by Section 605, which provides that "no persons *not being entitled thereto* shall receive . . . any interstate

. . . communication by wire and use the same . . ." Thirdly, this was not an "unanticipated find".

> "Q. What was your assignment after you entered the apartment?
> A. I was assigned to answer the telephone calls that may come in." (A. 87)
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> • • •
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> "On April 27, 1960, at about 3:30 p.m., I was assigned to assist Special Agent Burton Homa to answer the telephone." (A. 137)
>
> • • •

Finally, the proscription under Section 605 is directed to the interception, and not to the capacity of the objector.

> "No person not being entitled thereto shall . . . *use* the same or any information contained therein for his own benefit or for the benefit of another not entitled thereto . . ." (Section 605, Title 47, U.S.C.) (Emphasis supplied)

2. The Government argues that the search was proper because the "affidavit stated that the sources of its information that such telephones were assigned to bookmakers and gamblers were reports of Internal Revenue officials in Milwaukee, Jacksonville and Louisville, and information *on file* in the office of the District Director in Chicago"; that since four different sources each reported that numbers called on the credit card were listed in the names of known gamblers, there was a substantial basis for crediting the hearsay. The Government concludes that *Ventresca* v. *United States*, 1 Cir., 324 F.2d 864 and *Aguilar* v. *Texas*, 84 S.Ct. 1509, thus do not apply. We disagree. The affiant testified:

> "Q. Do I understand you correctly that your basis for saying these were responsible officials is that someone at Illinois Bell Telephone Company introduced the

source of your information as an inspector of Illinois Bell Telephone Company?
A. Yes". (A. 59-60)

• • •

"Q. Do you know to whom they are known to be gamblers?
A. They are known to be gamblers to the special agents in the area.
Q. Did they tell you that?
A. Yes.
Q. Do you know the basis of their information?
A. I do not." (A. 65)

We submit this is directly within the proscription of both *Ventresca* and *Aguilar*.

"Thus, the affidavit leaves as a complete mystery the manner in which the Investigator discovered their information. There is no indication whatsoever that any of the evidence gathered through the investigation was based upon the personal knowledge or observation of the Investigators. As a consequence there arises doubt that such information was first-hand to the Investigators. The type of fact-finding activities that can qualify under the term 'investigation' are numberless. Investigations can, and frequently do, include the interrogation of witnesses, the receipt of information from informants, the receipt of telephone tips, the checking of files and records, etc. We would have in such a case, not a hearsay affidavit alone, but the distinct possibility of hearsay-upon-hearsay." *Ventresca* v. *U.S.*, 324 F2d 864, 869.

• • •

"The vice in the present affidavit is at least as great as in Nathanson and Giordenello. Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegation that the affiant

spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession.' The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on * * * to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'

'To approve this affidavit would open the door to easy circumvention of the rule announced in Nathanson and Giordenello. A police officer who arrived at the 'suspicion,' 'belief' or 'mere conclusion' that narcotics were in someone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure the warrant by swearing that he had 'received reliable information from a credible person' that the narcotics were in some one's possession."

Aguilar v. *State of Texas*, 84 S.Ct. 1509, p. 1513, 1514.

In regard to the affiant's stated "reason to believe" that gambling was on the premises, the government argues that it is sufficient that the detailed facts alleged provided a substantial basis for the Commissioner to conclude that such paraphernalis was probably present. We agree with the government's legal statement—but—there were *no* such facts alleged, detailed or otherwise stated.

3. The government's argument merely re-states the decision of the Court of Appeals for the Seventh Circuit. It has not argued the merit of our attack on that decision. We, therefore, rely on argument formerly made.

CONCLUSION.

Wherefore, for the reasons advanced in our Petition and for the reasons in the above and foregoing reply, we pray a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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